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United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re] Case No. 05-59499-ASW
David R. Bricksin and] Chapter 7
Vivian M. Bricksin,]
Debtors.]

MEMORANDUM DECISION

ON THE UNITED STATES TRUSTEE'S MOTION TO DISMISS

Before the Court is the motion of the United States Trustee ("Trustee") to dismiss the chapter 7 case of David R. Bricksin and Vivian M. Bricksin ("Debtors"). Trustee brought this motion pursuant to 11 U.S.C. §§ 707(a), 109(h) and 521(b) and Interim Rule 1007(b)(3) asserting that Debtors failed to file certificates from an approved credit counseling agency evidencing Debtors' receipt of credit counseling within the 180-day period preceding the date of filing the petition.

This Memorandum Decision constitutes the Court's findings of fact and conclusions of law, pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I.

PROCEDURAL BACKGROUND

Debtors filed a voluntary petition under chapter 7 of the Bankruptcy Code ("Petition") on November 22, 2005. On December 2, 2005, Trustee filed a "Motion by United States Trustee to Dismiss Chapter 7 Case" ("Motion to Dismiss").

On January 9, 2006, Debtors filed "Debtor's Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Debtor's Response"), along with the "Declaration of David Bricksin, with Exhibits, in Support of Debtor's Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Declaration of David Bricksin"). On February 22, 2006, Trustee filed a "Memorandum of Law in Further Support of the Motion by United States Trustee to Dismiss Chapter 7 Case" ("Trustee's Memorandum of Law"). On March 20, 2006, Debtors filed "Debtor's Supplemental Response to United States Trustee's Motion to Dismiss Chapter 7 Case and Debtors Response to Memorandum of Law in Further Support of the Motion by United States Trustee to Dismiss Chapter 7 Case: Declaration of David Bricksin" (Debtors' Supplemental Response").

On April 3, 2006, Trustee filed a "Reply to Debtors' Supplemental Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Trustee's Reply to Debtor's Supplemental Response") and an accompanying "Declaration of Shannon L. Mounger in Support of Reply to Debtor's Supplemental Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Declaration of Mounger").

The matter was fully briefed and argued on May 4, 2006.

Debtors appeared *in propria persona*. Trustee was represented by Shannon L. Mounger, Esq. The Court heard testimony from the Debtors at the hearing.

II.

STATEMENT OF FACTS¹

The facts of this case are undisputed.

Debtors' financial difficulties began when, sometime in 2004², David Bricksin lost a relatively high-paying job. As a result of this unexpected calamity, Debtors were no longer able to afford their then-current lifestyle. Concerned about their mounting debts, David Bricksin contacted Consumer Credit Counseling Services ("CCCS").

Debtors sought the professional assistance of CCCS to evaluate their options. CCCS conducted a counseling session with Debtors. The session was held on or about October 19, 2005.³ During the course of the counseling provided by CCCS, the Debtors received

¹ The information in this section comes from the Declaration of David Bricksin dated January 8, 2006, the Declaration of Mounger dated April 3, 2006, the Exhibits attached to the declarations, and the testimony received at the hearing.

² The actual date when Mr. Bricksin lost his job does not appear in the record, but it can be inferred from the circumstances that it occurred sometime in 2004. In any event, the exact date is of no legal consequence.

³ The Trustee points to CCCS's October 19, 2004 Letter to David Bricksin, attached to the Declaration of Mounger as Exhibit A, as evidence that Debtors participated in a credit counseling session on October 19, 2004. See Trustee's Reply to Debtor's Supplemental Response. However, the Declaration of David Bricksin, indicates that the services of CCCS were sought "[e]arly in 2005". The Court finds that the Trustee's account is correct, and that Mr. Bricksin must have been mistaken as to the date of the counseling session.

1 instruction in financial management and actively participated in a
2 financial management course. They provided all of their financial
3 information to CCCS, including their current income, living
4 expenses, assets and liabilities. CCCS then analyzed the
5 information and provided Debtors with customized recommendations.
6 Based on this information, CCCS advised the Debtors that they did
7 not have sufficient resources to repay their debts and recommended
8 that they file for bankruptcy protection. Debtors were determined,
9 however, to make an effort to repay their creditors without the aid
10 of a bankruptcy filing.

11 With CCCS's professional expertise, a customized action plan
12 was created, which contained recommendations and options for the
13 Debtors.⁴ As a part of this customized plan, CCCS developed a
14 repayment plan for the Debtors which was designed to allow Debtors
15 to reimburse their creditors. The repayment plan called for
16 monthly payments of \$2,200.00 toward their debts.

17 Debtors made regular and significant payments pursuant to the
18 repayment plan until July 2005. The total funds paid to creditors
19 under the repayment plan exceeded \$11,000.00. Sometime in July
20 2005, when the Debtors were running out of money and came to the
21 realization that they could no longer afford to continue with the
22 debt repayment plan, David Bricksin contacted CCCS again in an
23 effort to discuss with CCCS their financial situation. During this
24 conversation, Mr. Bricksin was told that the repayment plan would
25 be discontinued and that Debtors could not contact CCCS regarding
26 credit counseling services for five years. On July 28, 2005, CCCS
27 sent a letter, addressed to David Bricksin, stating that Debtors'

28 ⁴ Neither party has provided the Court with a copy of the
debt repayment plan prepared by CCCS.

1 financial circumstances no longer allowed them to continue with the
2 repayment plan.⁵ The Bricksins, of course, were aware of that fact
3 -- they had just told CCCS that they were unable to do so.

4 Debtors filed for bankruptcy protection on November 22, 2005.
5 As discussed above, before making this decision, Debtors had
6 consulted CCCS, a professional credit counseling agency, considered
7 the effect a bankruptcy filing would have on their lives, rejected
8 CCCS' advice that they file for bankruptcy, developed a debt
9 repayment plan with CCCS, attempted to repay creditors and, in
10 fact, made payments to creditors in excess of \$11,000.00. Their
11 decision to seek bankruptcy relief was clearly the result of a
12 well-informed, deliberate process. Debtors were in the process of
13 carrying out the repayment plan (i.e., making substantial monthly
14 payments to their creditors) within the 180-day period prior to
15 filing.

16 The second page of the Debtors' Petition contains a section
17 entitled "Certification Concerning Debt Counseling by
18 Individual/Joint Debtor(s)". In this section appear two boxes. To
19 the right of the first box is the sentence "I/we have received
20 approved budget and credit counseling during the 180-day period
21 preceding the filing of this petition". Adjacent to the second box
22 is the following statement: "I/we request a waiver of the
23 requirement to obtain budget and credit counseling prior to filing
24 based on exigent circumstances. (Must attach certification
25 describing.)". On the Petition, Debtors checked the first box. At
26 the time the Petition was filed, Debtors did not attach a
27 certificate regarding their receipt of credit counseling to the

28 ⁵ A copy of the July 28, 2005 letter is attached to the
Declaration of David Bricksin as Exhibit 2.

1 Petition, nor did they file one separately.

2 The Trustee filed the instant Motion to Dismiss on December 2,
3 2005. Attached to the Declaration of David Bricksin accompanying
4 Debtors' Response as Exhibit 4(a) is a certificate which states as
5 follows:

6 "I CERTIFY that on 12-22-2005, DAVID R BRICKSIN received
7 from Consumer Credit Counseling Service, an agency approved
8 pursuant to 11 U.S.C. § 111 to provide credit counseling,
9 an individual briefing (including a briefing conducted by
10 telephone or the Internet) that complied with the
provisions of 11 U.S.C. §§ 109(h) and 111. A debt
repayment plan was not prepared. If a debt repayment plan
was prepared, a copy of the debt repayment plan is attached
to this certificate."

11 Exhibit 4(a) is dated December 22, 2005, and is electronically
12 signed by Kathryn Gillespie, Counselor. Also attached to the
13 Declaration as Exhibit 4(b) is another certificate, identical in
14 all respects to Exhibit 4(a), except that it names "VIVIAN
15 BRICKSIN" as the recipient of credit counseling. According to
16 Exhibits 4(a) and 4(b), Debtors again received credit counseling on
17 December 22, 2005 -- one month after filing the Petition. Thus,
18 Debtors twice paid for and received credit counseling.

19 The Court held a hearing on the Motion to Dismiss on May 4,
20 2006. Both Debtors testified at the hearing.

21 III.

22 APPLICABLE LAW

23
24 Trustee brings its Motion to Dismiss pursuant to 11 U.S.C. §§
25 109(h), 521(b), 707(a) and Interim Rule 1007(b)(3).

26 Congress recently enacted the Bankruptcy Abuse Prevention and
27 Consumer Protection Act of 2005 ("BAPCPA"). The provisions of the
28 BAPCPA became effective on October 17, 2005.

1 Section 109(h), which was added to the Code as a part of the
2 BAPCPA, provides, in pertinent part, that "an individual may not be
3 a debtor under this title unless such individual has, during the
4 180-day period preceding the date of filing of the petition by such
5 individual, received from an approved nonprofit budget and credit
6 counseling agency described in section 111(a) an individual or
7 group briefing (including a briefing conducted by telephone or on
8 the Internet) that outlined the opportunities for available credit
9 counseling and assisted such individual in performing a related
10 budget analysis." 11 U.S.C. §109(h)(1) (2005).

11 This Court has adopted the Interim Rules prepared by the
12 Advisory Committee on Bankruptcy Rules pursuant to General Order
13 No. 16 dated September 23, 2005. Interim Rule 1007(b)(3) states,
14 in relevant part, that "an individual must file the certificate and
15 debt repayment plan, if any, required by § 521(b)." Federal Rules
16 of Bankruptcy Procedure, Interim Rule 1007(b)(3) (2005). Section
17 521(b), also effective October 17, 2005, requires that the debtor
18 file with the court "(1) a certificate from the approved nonprofit
19 budget and credit counseling agency that provided the debtor
20 services under section 109(h) describing the services provided to
21 debtor; and (2) a copy of the debt repayment plan, if any,
22 developed under section 109(h) through the approved nonprofit
23 budget and credit counseling agency referred to in paragraph (1)."
24 11 U.S.C. § 521(b) (2005).

25 Section 707(a) provides for dismissal of a case for cause. 11
26 U.S.C. § 707(a) (2005). The section lists a number of examples
27 which constitute "cause", but this list is illustrative and not
28 exhaustive. In re Padilla, 222 F.3d 1184, 1191 (9th Cir. 2000).

1 Trustee submits that Debtors failed to obtain credit counseling
2 from an approved agency within the 180-day period prior to filing
3 the Petition and failed to file the certificate required by
4 § 521(b). Trustee argues that these failures constitute cause for
5 dismissal of Debtors' case under § 707(a). Debtors contend that
6 they did comply with the relevant statutory requirements and,
7 accordingly, the Trustee's Motion to Dismiss should be denied.

8 IV.

9 ANALYSIS

10
11 The Petition was filed on November 22, 2005, and thus all
12 statutory amendments contained in the BAPCPA apply in this case.

13 Read in tandem, §§ 109(h), 521(b), 707(a) and Interim Rule
14 1007(b)(3) require the Debtors to receive credit counseling from an
15 approved agency within the 180-day period prior to filing the
16 Petition, and to file a certificate evidencing their receipt of the
17 pre-petition counseling in order to be eligible Debtors under the
18 Bankruptcy Code.

19 Construed strictly, Debtors have not satisfied the letter of
20 the statutory requirements. Debtors did receive credit counseling,
21 but the date of the initial session was not within the 180-day
22 period prior to filing. While the Debtors checked the box on the
23 Petition to indicate receipt of pre-petition counseling, they did
24 not attach the certificates required by Interim Rule 1007(b)(3).⁶

25 _____
26 ⁶ Debtors did attach certificates which appear to show
27 their receipt of credit counseling to the Declaration of David
28 Bricksin (Exhibits 4(a) and 4(b) referenced in section II(C)
above). Both of these certificates are dated December 22, 2005,
exactly one month after the Petition date. Thus, these
certificates apparently relate to post-petition counseling, and do
not fulfill the statutory requirements.

1 However, the intent of Congress in enacting these particular
2 provisions of BACPCA is clear. The statutory provisions requiring
3 debtors to receive credit counseling before they can be eligible
4 for bankruptcy relief were enacted so that debtors "will make an
5 informed choice about bankruptcy, its alternatives, and
6 consequences." H.R. Rep. No. 109-031, at 2 (2005). As one court
7 has stated, "[t]he statute is clear in that it unequivocally
8 requires that the credit counseling be obtained *prior to* the filing
9 of the petition." In re Warden, No. 05-23750, 2005 WL 3207630
10 (Bankr. W.D. Mo. Nov. 22, 2005) (emphasis added). Congress'
11 objective "in enacting the credit counseling requirement is that
12 focusing on a budget analysis with the help of a credit counseling
13 professional might obviate the need for seeking bankruptcy relief
14 for some debtors." Id. The Warden court dismissed the debtor's
15 petition for failure to obtain credit counseling pre-petition,
16 finding that the Congressional intent is not upheld by receiving
17 post-petition counseling. Id.

18 The Court finds that application of the statutory scheme to
19 dismiss this case, as the Trustee urges, would produce a result at
20 odds with Congressional intent. The intent behind these statutory
21 amendments is to encourage debtors to seek alternatives to the
22 bankruptcy process and to promote debtor awareness of the effects
23 of a bankruptcy filing by requiring pre-petition credit counseling.
24 Debtors had received extensive pre-petition credit counseling and
25 then -- during the 180-day period prior to filing for bankruptcy --
26 were proceeding with their repayment plan, and making very
27 substantial payments to creditors. While failing to comply with
28 the law's technical letter, the Debtors were clearly in compliance

1 with its spirit. The Court finds that the Debtors' need for a
2 bankruptcy filing was not and could not have been obviated by
3 additional credit counseling. Debtors were keenly aware of the
4 implications of the bankruptcy filing. Indeed, CCCS had advised
5 the Debtors that their only viable option was to file for
6 bankruptcy.

7 While the credit counseling session attended by Debtors was
8 held outside of the 180-day period prescribed by the statute, the
9 Court is persuaded that Debtors' participation in and performance
10 under a debt repayment plan constitutes ongoing credit counseling
11 sufficient to satisfy the statutory requirement on the individual
12 and unusual facts of this case. Debtors performed under the
13 repayment plan until July 2005, less than 180 days before filing
14 the Petition. This performance necessitated that Debtors write a
15 substantial check each month toward the payment of their debts.
16 Debtors were no less aware of their financial predicament in July
17 2005 than they were at the time their counseling session was held.
18 The Court finds that Debtors' completion of credit counseling, and
19 then ongoing performance under the debt repayment plan within the
20 180-day period prior to filing, fulfills the spirit of the
21 statutory requirement. This is especially true here, where the
22 credit counselor advised Debtors to file for bankruptcy in the
23 first place. Debtors did not follow that advice and attempted to
24 carry out a repayment plan. Then, after making substantial
25 payments to their creditors, Debtors accepted the reality of their
26 situation and filed for bankruptcy -- as CCCS had initially advised
27 them to do.

28 Counsel for the Trustee pointed out at the hearing that the

1 agency from which Debtors received counseling was not on the
2 approved list of providers at that time. However, that provider
3 was subsequently approved in September 2005, prior to the effective
4 date of the BAPCPA.⁷ This situation is perfectly understandable in
5 the context of this brand new legislation. The Bankruptcy Court is
6 a court of equity. Debtors have already paid for and completed two
7 credit counseling sessions. It would be inequitable for this Court
8 to hold that these Debtors' technical non-compliance with the law,
9 despite their very best efforts, warrants dismissal of this case,
10 which would require these Debtors to start all over, to pay another
11 \$299.00 filing fee, and potentially deprive them of the protection
12 of the automatic stay.⁸

13 V.

14 CONCLUSION

15
16 Despite Debtors' technical non-compliance with the statutory
17 scheme, Debtors clearly complied with the spirit of the rule. In
18 the context of this new statute, this unique set of facts is
19 unlikely to present itself again. Application of the law in this

20
21 ⁷ Counsel for the Trustee noted that the providers approved
22 by the Trustee were required to go through an application process
23 and that some providers were required to change their procedures to
24 receive approval. However, the Trustee does not suggest that the
25 Debtors in fact were improperly counseled or misled in any way. To
26 the contrary, all of the available evidence suggests that Debtors
27 acted responsibly and made every effort to comply with the spirit
28 of the statutory requirements. Moreover, The Trustee certainly
could have advised the Court if CCCS's procedures had to be
revamped following BAPCPA. The Trustee presumably would have
access to that information and did not introduce any evidence to
that effect.

28 ⁸ Debtors list a secured vehicle debt relating to a 2002
Chevrolet Suburban on their Schedule D which is potentially
affected by the automatic stay.

1 case to dismiss Debtors' petition would contravene Congressional
2 intent. Therefore, the Trustee's Motion to Dismiss is denied.

3 Dated:

4 7/26/06

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6 ARTHUR S. WEISSBRODT
7 UNITED STATES BANKRUPTCY JUDGE
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UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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